MOTION FILED
NOV 17 1982

No. 81-1891

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1981

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MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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## MOTION FOR LEAVE TO FILE AND BRIEF OF THE SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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JED L. BABBIN
SHIPBUILDERS COUNCIL OF AMERICA
1110 Vermont Avenue, NW
Washington, DC 20005
(202) 775-9060
*Counsel for Amicus Curiae*
*Shipbuilders Council of America*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED FOR REVIEW AND LIST OF PARTIES

*Amicus Curiae* Shipbuilders Council of America adopts the statement of Questions Presented for Review and the list of parties set forth in Petitioners' brief.

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## MOTION FOR LEAVE TO FILE A BRIEF OF THE SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Shipbuilders Council of America ("Council"), the national trade association of the shipbuilding and ship-repairing industry in the United States, hereby requests leave to file the attached brief *amicus curiae* in support of petitioners Morrison-Knudsen Construction Company and Argonaut Insurance Company. The Council has re-



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ceived written consent from petitioners and from the Director, Office of Workers' Compensation Programs, for the filing of this brief. Respondent Hilyer has declined to consent to the filing of this brief.

### A. Nature of the Shipbuilders Council's Interest

The Council is a trade association composed of 22 companies engaged in shipbuilding and shiprepairing in the United States. A list of the members of the Shipbuilders Council is annexed hereto as the Appendix. In each shipyard, many, if not most, of the employees are covered under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). A failure of this Court to overturn the decision below will have a catastrophic economic effect on the shipbuilding industry.

### B. Background

At issue below was the question of whether, in computing a deceased employee's "wages", fringe benefits paid by the employer to union funds should be included, thus raising the amount of benefits due to the decedent's estate.

At trial and upon appeal, petitioners argued that the definition of the term "wages" under the LHWCA did not include such fringe benefits. Both the Administrative Law Judge and the Benefits Review Board accepted petitioners' arguments based upon a 54 year old interpretation of the Act. In its opinion entered on December 1, 1981, the United States Court of Appeals for the District of Columbia Circuit reversed these rulings and held that the definition of the term "wages" encompassed payments of identifiable value, including fringe benefits, that were paid for the benefit of the employee at the time of the injury. The Court of Appeals stated that the Act is remedial and that the court believed it was obliged to construe it liberally, resolving doubts in favor of the claimant. The case before this Court is one of first impression.

### C. This Case Presents a Question of Law of Vital Concern to the Shipbuilding Industry

Since 1927, when the LHWCA was first enacted, many of the employees of the members of the Council have been covered by that Act. Since the 1972 amendments, virtually all of the employees in each of the shipyards are now covered. Hundreds of shipyard workers have been injured and have been paid workers' compensation for their injuries under the LHWCA. Since long before 1972, shipyard workers have been entitled to fringe benefits of many types under their contracts of employment. The amounts, or even percentages of the employees' wages, which were reflected in fringe benefits are not now entirely determinable.

If the judgment of the Court of Appeals is not reversed by this Court, as the Council believes it should be, the liability of each shipyard, both prospectively for injuries in the future and, perhaps, retroactively for injuries which have already occurred, will be increased, to an undefined degree, by the amount of fringe benefits paid to prior, present, and future employees. For these reasons it is submitted that this Court should consider the arguments and the interests of the Shipbuilders Council which will be affected directly by this Court's decision.

WHEREFORE, the Shipbuilders Council of America prays that the following brief in support of petitioners' be accepted for filing.

Respectfully submitted,

JED L. BABBIN
SHIPBUILDERS COUNCIL OF AMERICA
1110 Vermont Avenue, NW
Washington, DC 20005
(202) 775-9060
*Counsel for Amicus Curiae*
*Shipbuilders Council of America*

November 18, 1982

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE

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*Amicus curiae* Shipbuilders Council of America ("Council") prays that the judgment of the United States Court of Appeals for the District of Columbia be reversed because it has interpreted erroneously the terms of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") 33 U.S.C. §§ 901 *et seq.*, (1976) as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501 *et seq.* (1973).

## INTEREST OF THE AMICUS CURIAE

The Council is a national trade association composed of 22 companies engaged in shipbuilding and shiprepairing in the United States. These shipyards employ approximately 112,000 people across the nation. Most of these employees are covered by the LHWCA. Further, each shipyard provides fringe benefits directly to each employee or indirectly through payments to a variety of trust funds. Should the Court fail to overturn the judgment below, the shipbuilding industry will suffer an immediate major change to its liability under the LHWCA. Most shipbuilders are self-insured due to the present variable annual escalation of benefits under LHWCA which precludes forecasting of economic risk. Their present economic exposure, for claims which have already been adjudicated, will be clouded since courts could permit claimants to seek modification of their awards on the basis of a claim for fringe benefits paid at the time of the injury or death even if it had occurred years ago. The liability for future claims will rise in an uncertain manner, depending upon the amount and type of fringe benefits paid under union agreements. These severe consequences would be the result of a decision which overturns 54 years of congressional approval of industry and Government's interpretation of the Act.

## STATEMENT OF THE CASE

The Court has before it three cases, all of which involved the same claimant and the same legal issues, and which were consolidated on appeal in the United States Court of Appeals for the District of Columbia Circuit. These three cases all arose as a result of the death in April 1973 of James H. Hilyer during his employment by petitioner Morrison-Knudsen Construction Company ("Morrison-Knudsen"). The workers' compensation statute covering Hilyer at the time of his death was the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501 *et seq.* (1973), which incorporated provisions of the LHWCA.

At the time of his death, Hilyer was a member of Local 456 of the Laborers District Council of Washington, D.C. and vicinity, an AFL-CIO affiliate. In addition to the covered employees' hourly rates paid, the collective bargaining agreement between the union and Morrison-Knudsen provided that the company would pay fixed sums of money into three union trust funds. Specifically, the company agreed to pay 28 cents into the health and welfare fund, 35 cents into the pension funds, and five cents into the training fund, for each hour that each employee worked.

Morrison-Knudsen began paying death benefits under the LHWCA to respondent Sonia Hilyer immediately upon her husband's death. A dispute arose over the amount of the benefits to which she was entitled. Respondent Sonia Hilyer contended, *inter alia*, that the company's contributions to the three union trust funds should be regarded as part of her husband's "average weekly wage" under the LHWCA. Under Section 9(e) of the LHWCA death benefits are computed by reference to the "average weekly wage" of the deceased employee, determind on an annual basis. In proceedings before both the Department of Labor Administrative Law Judge and the Benefits Review Board, it was determined that the employer's trust fund contributions should not be included in the determination of the decedent's average weekly wage and thus the benefits payable to his surviving spouse.

Respondent Sonia Hilyer appealed the ruling of the Benefits Review Board to the United States Court of Appeals for the District of Columbia Circuit. On December 1, 1981, the Court of Appeals reversed the Benefits Review Board and held that because payments to the union trust funds were "readily identifiable and calculable" and were of substantial economic benefits to the employee, they should be included in determining decedent's "average weekly wage" and, thus, benefits to which the surviving spouse is entitled. This was the first time since the LHWCA was enacted in 1927 that any court had deter-

mined that such fringe benefits should be included in the determination of "wages" under the Act.

## ARGUMENT

The case before the Court is one of first impresssion. Since the LHWCA was enacted in 1927, no court has held that fringe benefits paid to employees should be included in the calculation of an employee's wages for the purposes of determining what benefits the employees or their surviving spouses would be entitled to under the LHWCA. The Department of Labor long ago adopted the view that fringe benefits are not included in wages in determining LHWCA benefits. Moreover, and most importantly, the Congress has never moved to amend the LHWCA to reverse these longstanding judicial and administrative interpretations.

The 1972 amendments to the LHWCA provided for annual escalation of benefits based upon an annual determination of the national average weekly wage. This uncertain annual escalation has resulted in an inability of virtually all shipbuilders to obtain workers' compensation insurance for workers covered by the LHWCA.

The shipbuilding industry is one of two industries which are the principal employers of persons covered by the LHWCA. Since 1972, the shipbuilding industry has seen the cost of benefits under the LHWCA grow by about 850%. Under the 1972 amendments to the Act, jurisdiction was both expanded and muddled. This has brought about an economic situation which can only be described as untenable.

### A. The Prospective Effect of the Hilyer Decision Would Be Enormous.

At present there are approximately 112,000 employees engaged in shipbuilding and shiprepair in the United States and employed by members of the Council. The average hourly wage of those employees is approximately $9.00

per hour. When the Court of Appeals decision was announced, the Council conducted a survey of a representative sample of its membership to determine the probable effect of this decision. The result is staggering. The average fringe benefits paid in the shipbuilding industry are valued at 36.7% of total hourly wages paid varying from a low of 21.5% to a high of 73.3% among the different shipyards.

If the Court of Appeals decision is affirmed, the amount of reserves maintained for workers' compensation by the shipyards as self-insurers will have to be increased accordingly. This will, of necessity, be accompanied by a concomitant reduction in the amount of funds available for capital improvement and growth.

If the decision below is affirmed, each shipyard will be unable to determine whether a court will include, in benefits payable under LHWCA, some or all of the fringe benefits it pays to its employees. It is unusual for a shipyard to have only one union agreement with its employees. Frequently there are several unions representing ten or more separate bargaining units in a shipyard. A shipyard thus may have ten separate schedules of fringe benefits of varied type and value for its employees. Many fringe benefits do not have a dollar figure attached to them. Moreover, the value of some fringe benefits may be subject to varying interpretations of the employment contract.

The additional question of determining which fringe benefits are to be included in LHWCA payments will cause considerable confusion among employers. The most likely result would be a tremendous increase in the number of contested cases, delaying the payment of some benefits to injured workers and their families. This would be directly in contravention of Congress's intent in enacting the LHWCA.

**B. The Potential Retroactive Effect of the Court of Appeals Decision is Incalculable.**

LHWCA specifically permits beneficiaries to reopen any case for compensation at any time up to one year after the last payment is made based on a mistake of fact 33 U.S.C. §§ 922 (1976). In the event that the Court of Appeals' decision stands, each beneficiary who is receiving benefits, as well as those whose entitlement has expired recently, may be entitled to reopen their cases and seek the inclusion of fringe benefits in their compensation payments, plus interest, going back to the date of the injury, regardless of how long ago the injury occurred.

In October 1978, the Council received the report of a study it commissioned by the firm of Tillinghast, Nelson, and Warren on the subject of LHWCA costs since the 1972 amendments. That report showed between 1970 and 1976, 23,857 new cases were filed under the LHWCA by shipyard employees. The average number of new cases per year came to just over 3,400. The Benefits Review Board is already having great difficulty in handling its present caseload. If the rationale of the court below is affirmed, the wave of petitions to reopen old cases, and the resulting appeals, could result in a delay of years in Board proceedings.

The principal purpose of workers' compensation is to provide prompt and adequate determination of benefits entitlement without long and costly litigation, and with certainty as to the employer's liability. We submit that the decision of the Court of Appeals will have precisely the opposite effect. Despite the fact that the issue in this case is one of *law* and not one of *fact*, claimants and the lower courts will certainly find a way to apply this decision retroactively. An affirmance will simply result in the relitigation of hundreds, if not thousands, of cases which have already been decided, at untold cost to claimants and employers.

### C. The Court Should Give Great Weight to the Consistent Interpretation of the LHWCA by the Department of Labor.

As is well demonstrated by the Petitioner's brief, the United States Department of Labor, which is charged with the responsibility of administering the LHWCA, has never included fringe benefits in the determination of wages under the Act. *See* United States Department of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, *LS/HW Program Memorandum, No.* 32 (June 17, 1968). This Court has always held that a long-term uniform administrative interpretation of a statute by the agency responsible for administering it is entitled to great weight. *United States* v. *Rutherford*, 442 U.S. 544, 553-554 (1979). Such deference is particularly appropriate where, as here, the agency interpretation has received *sub silentio* approval by Congress. In 1972 Congress amended numerous parts of the LHWCA but left untouched the definiiton of a worker's average weekly wage and thus the Department of Labors' interpretation of the term.

This Court has also held consistently that administrative interpretations which have been substantially relied on in the formulation of dependent economic practices should "not be disturbed except for cogent reasons". *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921). See also *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), and *Saxbe v. Bustos*, 419 U.S. 65 (1974). The consistent intepretation by the Department of Labor should not be disturbed because of the substantial reliance on it by employers who have paid benefits, purchased insurance, and established self-insurance reserves predicated upon it.

The economic interests of employers who have paid benefits to workers since 1927 are considerable. These employers have relied on the Department of Labor's interpretation of the Act and have not included in the cal-

culation of LHWCA benefits the amount of fringe benefits paid to the employees' union. To reverse this interpretation judicially would place such a substantial additional burden on employers that some could literally be overwhelmed by it.

The effect of this decision on the employers, the insurers, the Labor Department, and the employees themselves will be substantial and chaotic. Where the administrative interpretation is well-founded and consistent, where the new judicial interpretation would have such a catastrophic effect, and where the Act would be virtually impossible for the Department of Labor to administer, the Council submits that there are no cogent or compelling reasons to overturn the prior administrative interpretation of the Act.

## CONCLUSION

*Amicus curiae* Shipbuilders Council respectfully submits that the Court of Appeals decision is founded upon an entirely new and incorrect interpretation of the LHWCA. Had it been the intention of the Congress to include fringe benefits within the term "wages" under the Act, it would certainly have acted to overturn the Department of Labor's consistent administrative determination at some time in the last 54 years. It has not done so. Is is submitted that it has not done so because the Department of Labor's intepretation is correct. For that reason the Council prays that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

JED L. BABBIN
SHIPBUILDERS COUNCIL OF AMERICA
1110 Vermont Avenue, NW
Washington, DC 20005
(202) 775-9060
*Counsel for Amicus Curiae*
*Shipbuilders Council of America*

November 18, 1982

## APPENDIX

*Shipyard Members of the Shipbuilders Council of America*

Alabama Dry Dock & Shipbuilding Co.
Mobile, AL

The American Shipbuilding Co.
Tampa, FL

Avondale Shipyards, Inc.
New Orleans, LA

Bath Iron Works Corp.
Bath, ME

Bay Shipbuilding Corp.
Sturgeon Bay, WI

Bethlehem Steel Corp.
Bethlehem, PA

Coastal Dry Dock & Repair Corp.
Brooklyn, NY

General Dynamics Corp.
St. Louis, MO

General Ship Corporation
East Boston, MA

Ingalls Shipbuilding Division
Litton Industries
Pascagoula, MS

Jacksonville Shipyards, Inc.
Jacksonville, FL

Lockheed Shipbuilding & Construction Co.
Seattle, WA

Marine Power & Equipment Co., Inc.
Seattle, WA

Marinette Marine Corp.
Marinette, WI

Maryland Shipbuilding & Drydock Co.
Baltimore, MD

National Steel & Shipbuilding Co.
San Diego, CA

Newport News Shipbuilding & Dry Dock Co.
Newport News, VA

Norfolk Shipbuilding & Drydock Corp.
Norfolk, VA

Savannah Shipyard Co.
Savannah, GA

Southwest Marine, Inc.
San Diego, CA

Todd Shipyards Corp.
New York, NY

Tracor Marine, Inc.
Port Everglades, FL